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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

JOHN ALLISON and RENEE ALLISON,

Petitioners,

vs.

PACIFIC BELL,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT
OF THE STATE OF CALIFORNIA

PETITION FOR WRIT OF CERTIORARI

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Questions Presented For Review

A. Whether the state constitutional and statutory scheme that permits a telephone company to limit its own negligence liability towards third party claimants abridges federal liberty, due process and equal protection guarantees.

B. Whether the telephone tariff limitation represents an unconstitutional delegation of power in violation of the separation of powers doctrine.

Parties To The Proceeding

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Citations Of Opinions And Orders

The opinion of the Court of Appeal for the County of Los Angeles, Second District, in the matter of *Pacific Bell v. Superior Court, John Allison and Renee Allison, Real Parties in Interest*, Second Civil No. B124873, is set forth in Appendix page 1a.

The Order of the California Supreme Court denying Petition For Review dated March 9, 1999 is set forth in Appendix page 11a.

Basis For Jurisdiction In This Court

The California Supreme Court denied Appellants' Petition For Review on March 9, 1999.

There has been no order requesting rehearing or granting an extension of time to file the petition for a writ of certiorari.

This Court has jurisdiction to review the decision of the California Supreme Court on a writ of certiorari pursuant to 28 U.S.C. § 1257(a). In addition, 28 U.S.C. § 2403(b) may apply.

State Constitutional Provisions and Statutes In Question

This case calls into question Article XII, §§ 1-9 of the California Constitution (set forth at Appendix 13a), which provides for establishing and enabling a state Public Utilities Commission ("CPUC") whose members are appointed by the governor and the state senate. Also called into question is *California Public Utilities Code* § 1759, which severely limits judicial review of CPUC pronouncements. (Appendix 12a.)

Statement Of The Case

The underlying case involves a California citizen who was rendered a quadriplegic through the negligence of a telephone company, Pacific Bell. In a writ of mandate proceeding, the California Court of Appeal held that a tariff filed by Pacific Bell with the CPUC limited the telephone company's liability to $10,000 in the event Pacific Bell was found grossly negligent.

In affirming that the tariff limitation applied, the California Court of Appeal during writ proceedings described the facts leading up to this case as follows:

> On September 13, 1992, plaintiff John Allison either dove or fell into the shallow end of a swimming pool at his condominium complex, Rainbow Glen Estates. Mr. Allison struck his head on the concrete pool and was rendered a quadriplegic. "When Mr. Allison was injured, one of his companions called "9-1-1" from a Pacific Bell (owned) pay phone installed at the condominium's pool and recreation area. According to plaintiffs, when Pacific Bell installed the wiring for the pay phone two years prior to the accident, it backtracked the wire to determine its point of origin, which was one of the model homes at the complex. The address which Pacific Bell affixed to the pay phone and input into the 9-1-1 emergency data base was the address of the model home, 20815 Greenjay Place, and not the address of the pool and recreation area, 26815 Rainbow Glen Drive. Pacific Bell

collected coins from the pay phone on several occasions, but never changed the address posted on the phone. Thus, the emergency medical personnel could not locate Mr. Allison because, although they responded promptly to the 9-1-1 call, they went to the wrong address.[1] Mrs. Allison, her daughter and others at the pool complex could hear the sirens and see the flashing lights on the paramedic ambulance as it went up and down other streets at the complex. Finally, someone from the group went and flagged down the ambulance. Mr. Allison did not receive medical attention until 35 to 45 minutes after the accident; plaintiffs contend the delay exacerbated his injuries because during the period of delay, a jagged portion of Mr. Allison's cervical spine was allowed to repeatedly traumatize his spinal cord. (Appendix 3a.)

Pacific Bell placed an incorrect address on a pay telephone in a swimming pool and recreation area, a place where the odds of an accident occurring are greater than normal. That being the case, the accuracy of the address information on the telephone is

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[1]Under the ALI (Automatic Location Identifier) component of the E-911 system, the computer display monitor automatically displayed the address and telephone number of the caller, without the caller ever having to identify that information. Unfortunately, the address was wrong.

particularly significant. Plaintiffs presented evidence in opposition to Pacific Bell's motion that Pacific Bell knew the address on the telephone was inaccurate and failed to correct the mistake, despite the fact that its technicians visited the site on a number of occasions to collect coins from the phone. Pacific Bell has also admitted that when the address on a particular telephone does not match the phone's location, the coin collector is supposed to notify Pacific Bell's business office. That was not done in this case. Pacific Bell also knew that the telephone would be linked to the 9-1-1 system, making it imperative that the telephone reflect the premises' correct address. (Appendix 9a.)

Procedural History

Pacific Bell moved for summary judgment in November 1997, asserting that Mr. Allison's negligence cause of action and Mrs. Allison's cause of action for loss of consortium were barred by Pacific Bell's tariff with the CPUC. The Motion was denied.

Pacific Bell requested the trial court to reconsider its order in light of a new state appellate opinion, *Los Angeles Cellular Telephone Co. v. Superior Court*, 65 Cal.App.4th 1013, 76 Cal.Rptr.2d 894 (rev. den. 10/21/98) [1998]. The trial court reconsidered its earlier order but again denied summary judgment.

Pacific Bell petitioned the state Court of Appeal for an Alternative Writ of mandate on August 24, 1998 and the Court issued its Writ the same day. The appellate court then addressed the matter on an expedited basis and on December 18, 1998 held that tariff liability limitations apply to third party personal injury actions. (Appendix 1a.)

The Plaintiffs petitioned the California Supreme Court for review and that petition was denied March 9, 1999. (Appendix 11a.)

Argument in Support of Petition

I.
A State Regulatory Framework Allowing a Utility to Limit Its Liability Towards Third Parties for Negligence Without Checks and Balances Violates Fundamental Republican Principles Embedded in Our Federal Constitution

The liberties we enjoy as a nation are often threatened by conveniences of the day.

Economic or political expediencies that present a threat to constitutional rights and freedoms must be called to heel. Even more important, when the reasons that once justified an expedient rule or law evaporate because of changing conditions, then just a gardener prunes wild growth from trees in the spring, so must this Court prune unhealthy growth that might otherwise strangle our people.

This case presents an individual who was rendered a quadriplegic due to the gross negligence of a telephone company. Because that same telephone

company had the foresight to included a $10,000 liability cap in a rate tariff it then filed with the California Public Utilities Commission ("CPUC"), that injured individual is now forever precluded from seeking a remedy from the agency responsible for his catastrophic loss.

The tariff in question has the force and effect of law, a phenomena not uncommon among the several states. Yet this law was passed without legislative fact finding or vote and without scrutiny by any executive. Indeed, the tariff, once passed into law by some cozy process involving only self-interested telephone company and chummy CPUC is by statute and decisional law almost entirely immune from judicial scrutiny.

All this, with no better justification than such utility regulation is justified since allows regulators to set rates and, in theory, confer a benefit upon telephone company customers. The regulatory framework presented has its roots in the trust-busting era of the last century, when "natural monopolies" provided the excuse for an expedient solution about how private utilities should be managed by a paternalist government.

Only our country is no longer peering into the twentieth century from the nineteenth. We have progressed a full century and the realities have changed.

Specifically in the area of telephones, there are no longer any natural monopolies. Rates are no longer governed solely by regulation, market forces are in control. In California especially, communications companies scramble to compete for market share. In sum, the rationale that once may have justified the cozy regulatory scheme presented here has evaporated with a changing marketplace.

Only the concentrated power of a private utility and CPUC, neither answering or accountable to the people, has passed a law that ensures any individuals similarly-situated with the Petitioners will become wards of the state rather than providing them with the means to recover for the wrong done them from the wrongdoer.

This case highlights a fundamental truth that prompted the founders to devise a government system in which power emanating from the people could not be concentrated in those who govern. The philosophical underpinnings for the Separation of Powers doctrine are as old as Aristotle and vital as Montesquieu's writings on democracy.

> It was Montesquieu's fundamental contention that "men entrusted with power tend to abuse it." Hence it was desirable to divide the powers of government, first in order to keep to a minimum the powers lodged in any single organ of government; secondly, in order to be able to oppose organ to organ.

Constitution of the United States (Gov. Printing Office 1987) Introduction, § 2, pp. xvii-xviii.

This case presents a prime example of how, if left unchecked, the dangers posed by concentrated power that so troubled Aristotle, Montesquieu and our founding fathers will rob the people of their constitutional liberties.

This case also presents an opportunity for this Court to expand upon the legal precedent first enunciated in *Southern Express Company v. Caldwell*, 88 U.S. (21 Wall.) 264 [1874] and extending through *Bisso v. Inland Waterways Corp.*, 349 U.S. 85 [1955];

Southwestern Sugar & Molasses Co., 360 U.S. 411 [1959], which stand for the proposition that public policy militates against common carriers limiting their own liability for negligence.

In *Printz v. United States*, 117 S.Ct. 2365 [1997], this Court reaffirmed that the principles of limited government as envisioned by Madison and limitations on power delegated by the legislature as enunciated by such decisions as *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). *See Printz, supra*, 117 S.Ct at 2380.

The time has come to recognize that well-meaning regulatory schemes rooted in nineteenth century supply-demand economics require judicious pruning so they will serve, not oppress, the people of these United States.

II.
California's Regulatory Framework

A. The Public Utilities Act.

The stated purpose of California's Public Utilities Act is to ensure the public adequate service at reasonable rates without discrimination. (*Pacific Telephone & Telegraph Company v. Public Utilities Commission*, 34 Cal.2d 822, 826 [1950]) The CPUC "has the foundation of its authority in the Constitution of the State of California". (*Pratt v. Coast Trucking*, 228 Cal.App.2d 139, 145, 39 Cal.Rptr. 332, 336 [1964], relying on what is now California Constitution Article XII, Section 1)

The CPUC is the "only public agency which is constitutionally constructed to protect the public from the consequences of monopoly in public service industry... however, the primary function of the

commission is to regulate private property dedicated to a public use and to exercise control over private companies engaged in public service." (*People v. City of Fresno*, 254 Cal.App.2d 76, 80, 62 Cal.Rptr. 79 [1967]) The Act vests authority to regulate utilities in the CPUC which has the power to fix rates, establish rules, hold hearings and establish its own procedures. (*San Diego Gas & Electric Company v. Superior Court (Covalt)*, 13 Cal.4th 893, 915 [1996]) (hereinafter "*Covalt*") The CPUC's authority "includes not only administrative but also legislative and judicial power." (*Ibid.*)

B. Tariffs.

The CPUC is empowered to require utilities such as Pac Bell to file tariff schedules containing rates, charges and classifications. (*Waters v. Pacific Telephone Co.*, 12 Cal.3d 1 [1974]) ("*Waters*") These tariffs have the force and effect of a law. (*Waters*, 12 Cal.3d at p. 10; *Dyke Water Co. v. Public Utilities Commission*, 56 Cal.2d 105, 123 [1961] -- rules promulgated by the CPUC and filed as part of a tariff have "the force and effect of a statute, and any deviations therefrom (are) unlawful unless authorized by the Commission.") Orders and decisions of the CPUC also have the force and effect of law. (*Covalt*, 13 Cal.4th at p. 914-917)

Tariffs may contain limitations on liability, which may not be reinterpreted "in the guise of judicial construction. . . ." (*Waters*, 12 Cal.3d at p. 10 -- "Were the courts permitted to reappraise and reinterpret the language of Commission-approved tariff schedules in the guise of 'judicial construction,' the supervisory and regulatory functions of the Commission set forth above could easily be undermined.") Pac Bell's tariff

limits its liability for service and directory errors, but expressly does "not apply to errors and omissions caused by willful misconduct, fraudulent conduct or violations of law."

C. The 9-1-1 and Enhanced 9-1-1 System.

Government Code §§ 53100 and 53112 provide:

> The Legislature hereby finds and declares that *it is in the public interest to shorten the time required for a citizen to request and receive emergency aid...* Provision of a single, primary, three-digit emergency number *through which emergency service can be quickly and efficiently obtained...* will result in the saving of life.... "[A]ll pay telephones. . . *shall*. . . enable a caller to dial 911 for emergency services" (emphasis added).

The 911 system in its enhanced form (E-911) contains an automatic location identification (ALI) feature by which the address from which the 911 emergency call is placed appears on a screen before the 911 emergency operator. Pac Bell's tariff requires it to provide this feature with E-9-1-1 service. (Request for Judicial Notice ["RJN"], Ex. 2; See also, Ex. 3 which requires Pac Bell to provide location information to the 911 system.)

Government Code §§53100.5(b) and 53112 make it clear that the Allison's are within the class of persons sought to be protected by the E-911 system.

D. Public and Semi-Public Pay Telephones.

Pay phones are also strictly regulated in California. Most pertinent here is Pac Bell's tariff

requirement, as well as the CPUC's general requirement that the signage on each semi-public pay phone identify the specific location of that pay phone. Among other things, this requirement is intended to enable the caller in an emergency situation to give the proper address information to the 911 dispatcher.

III.
The State Constitutional and Statutory Scheme that Permits Pacific Bell to Limit Its Own Liability Towards Third Party Personal Injury Claimants to $10,000 Abridges Federal Liberty, Due Process and Equal Protection Guarantees

A $10,000 limit on personal injury economic damages such as the California Appellate Court held is contained in Pacific Bell's tariff provisions constitutes arbitrary law in violation of liberty and due process. It also deprives the Petitioners of equal protection guaranteed them by the federal constitution.

California follows English and United States common law. (*California Civil Code* § 22.2) The common law "by the age of the American Revolution" was driven by the concept that liberty was "an attribute of government." In other words, that "liberty was order because liberty was law." (John Phillip Reid, *The Concept of Liberty in the Age of the American Revolution*, University of Chicago Press, 1988, p. 10) Hence, "power without restraint is not legitimate." (*Ibid.*) Liberty in our society represents the capacity to exercise rights "within limits set . . . by *nonarbitrary law.*" (*Id.* at p.7)

Also, even if true, this proposition does not make the limitations on liability constitutional as to the

Allisons. They are not in a better position to insure against such injuries, nor have they accepted the benefits of reduced rates in exchange for tariff limitations. Indeed, there is no indication in the record that they are Pac Bell customers.

As such a third party, the Allisons' constitutional rights cannot be limited based on unfounded speculation that Pacific Bell's rates affect them. There is nothing in the record to indicate that the Allisons in any way benefitted from a limitation on liability. In fact, Pacific Bell and other telephone operators and utilities are *required* to provide 911 service *free of charge* on all semi-public and public telephones to anyone who wants it.

The argument that limitations on liability are justified as a means of keeping rates low cannot provide constitutional justification for the result reached by the California Appellate Court. There is now direct competition in the market place respecting local telephone service, and for coin operated pay telephones. Pacific Bell no longer has a monopoly, and it cannot be assumed the Allisons would be impacted *at all* by Pacific Bell's rates or benefitted by tariff limits.

The impossibility of the regulatory approach at issue in this case is highlighted in a line of cases decided by this Court in relation to a more traditional mode of communications, the river towboat.

Before Alexander Graham Bell's invention, the riverboat was a primary means of communication in the United States. Just as Pacific Bell desires today, towboat companies also sought to limit their liability for negligence.

The rule prohibiting such liability limitations was first stated in *The Steamer* Syracuse, 12 Wall. 167 [1871], which held in part that notwithstanding any

agreement to the contrary, "[a common carrier] `must be visited with the consequences' of its negligence." The rule endures today.

> For many years, *The Steamer Syracuse* seems to have been generally accepted as either (1) construing a contract to tow at own risk' as not including an exemption from negligence, or (2) holding invalid as against public policy a contract which exempts a tower from his negligence . . . . Because of [] judicial history and cogent reasons in support of a rule outlawing such contracts we now, despite past uncertainty and difference among the circuits, accept this as the controlling rule.

Bisso v. Inland Waterways Corp., 349 U.S. 85, 86-87, 75 S.Ct. 629 [1955]. Telegraph companies are specifically covered by the rule. *Southern Express Company v. Caldwell*, 88 U.S. (21 Wall.) 264, 269-270 [1874].

In *Southwestern Sugar & Molasses Co., Inc. v. River Terminals Corporation*, 360 U.S. 411, 79 S.Ct. 1210 [1959], a tariff clause was added to the equation. Again the issue was liability limitation. While paying heed to the useful function that a regulatory agency may provide in overseeing common carriers, the Court was firm in reserving a role for judicial oversight. "We may assume that the question whether a clause of this kind offends against public policy is one appropriate ultimately for judicial rather than administrative resolution." *Id.* at 420. Yet in this case, judicial oversight is virtually nonexistent. (*See* Section IV, below.)

In *Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 98 S.Ct. 2620 [1978], this Court upheld a statute limiting liability caps in connection with nuclear power plants, but noted that there was an available statutory scheme making an alternative remedy available and so due process was not abridged. *Id.* at 91-92.

Here, there is no alternative remedy available, no *quid pro quo* for the negligence cap to which the Petitioners may avail themselves. That defect in the regulatory scheme is a fatal flaw in that it undeniably denies the Petitioners due process in seeking to redress their claims.

As the California Constitution fully incorporates all protections set forth in the federal constitution, the regulatory scheme also denies due process by abridging the Petitioners' Seventh Amendment right to have a jury decide their damage claims. *See Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 118 S.Ct. 1279 [1998]; *Hetzel v. Prince William County*, 523 U.S. 208, 118 S.Ct. 1210 [1998].

The broad interpretation of tariff limitations which the California Appellate Court adopted cannot, on this record, be said to be rationally related to a legitimate State interest; especially so in light of recent telephone deregulation and the fact that free, safe and reliable 911 service has now been statutorily mandated and found to be critical to public safety.

The tariff limitation of liability urged by Pacific Bell here also violates equal protection. Under the traditional, rational relationship equal protection standard, the Court must conduct a serious and genuine judicial inquiry into the correspondence between the classification and the legislative goals. Even assuming that a "reduced rate" justification may apply to cases

such as this, there is no logical reason why the most severely injured personal injury victims should be singled out to bear the burden of lower or reduced utility rates – particularly where the limitations at issue have been interpreted to preclude recovery of medical costs and lost income for someone who has been rendered a lifetime quadriplegic. The result is a fundamentally arbitrary classification with no justification.

There is no evidence to establish that either the legislature or the CPUC found any emergency crisis to exist that would justify such an arbitrarily low economic damage ceiling in relation to a negligence cause of action for personal injuries that has existed since before 1850, when California became a state, and since before 1791, when our Bill of Rights was ratified.

The question therefore, is whether the limitation of liability at issue is "reasonably necessary" to ensure reasonable rates. Obviously, the answer is "no."

These serious constitutional issues illustrate why certiorari should be granted.

IV.
The Tariff Limitation Represents an Unconstitutional Delegation of Power in Violation of the Separation of Powers Doctrine

When denying summary judgment the second time, the trial court correctly observed that Pacific Bell had engaged in separate and distinct acts of negligence subsequent to installing the pay phone and assigning an incorrect address to it, both in the 911 system and on the pay phone itself. These acts (which are acknowledged by the Appellate Court) resulted in Pacific Bell's being placed on notice of the incorrect

address when its employees visited the pay phone on a number of occasions to collect monies from it, learned of the incorrect address which was on the pay phone, but did nothing to correct the problem. Pacific Bell's conduct in knowingly allowing this plainly hazardous condition to remain is an independent basis for liability and not constitutionally within any tariff limitations.

Therefore, even assuming, *arguendo*, that the tariff limitations could be applied in this case to limit Pacific Bell's liability for assigning an incorrect address to the phone in the first instance (and reporting that address to the 911 system and labeling the phone with that incorrect address), these limitations cannot apply to Pac Bell's subsequent tortious behavior.

Were it otherwise, such a delegation of power to determine the amount of pain and suffering and/or punitive damages would violate the judicial powers clause, even under the test articulated in *Walnut Creek Manor v. Fair Employment and Housing Commission*, 54 Cal.3d 245, 256 [1991], which held that "[a]gencies not vested by the Constitution with judicial powers may not exercise such powers". The first step in the analysis is to inquire as to whether the damages provision is authorized by legislation, and is reasonably "necessary to accomplish the administrative agency's regulatory purposes." The second step is to "closely scrutinize the agency's asserted regulatory purposes in order to ascertain whether the challenged remedial power is merely incidental to a proper, primary regulatory purpose, or whether it is in reality an attempt to transfer determination of traditional common law claims from the courts to a specialized agency . . . ." (*Id.*)

Walnut Creek held unconstitutional a statute delegating compensatory damage determination authority to the Fair Employment Administrative

Agency on the grounds that "the power to award compensatory and punitive tort damages to an injured party is a *judicial function*... involving... an award of *unliquidated* common law damages for personal injuries...". (54 Cal.3d at 262). The result closely follows the holding reached by this Court in *A.L.A. Schechter Poultry Corporation v. United States*, 295 U.S. 495, 537-538, 55 S.Ct. 837 [1935]: "Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry". *See also Printz v. United States*, 521 U.S. 98, 117 S.Ct. 2365, 2380 [1997].

The mere fact of legislative authorization does not shield the challenged power from scrutiny under the reasonable necessity/legitimate regulatory purpose prong of the judicial powers doctrine test. The judicial powers analysis contemplates a higher level of scrutiny than the rational basis test applied for due process purposes. The Opinion's application of the Tariff limits to for-profit coin-collecting conduct unrelated to advancing the public health cannot survive this level of scrutiny.

The imposition of liability would not be unduly burdensome to utilities for damages suffered by the Petitioners for "serious" personal injury, particularly in light of the fact that such accidents do not occur with great frequency.

Thus, the limitation on liability is not "reasonably necessary" to accomplish the CPUC's legitimate regulatory purpose, but rather in reality transfers to the CPUC the function of determining traditional, common law claims.

The tension between tariff limitations, the Public Utilities Code and every citizen's right to access to the Courts is further underlined by the struggle California courts have undergone in attempting to justify the unjustifiable consolidation of power at the CPUC, which defies even judicial review. As a matter of statute, a public utility may be held expressly liable to persons and others affected by its tortious conduct. (*Public Utilities Code* § 2106) In *Waters v. Pacific Telephone Co.*, 12 Cal.3d 1 [1974], the California Supreme Court tried to reconciled "the potential conflict between sections 1759 and 2106. . . ," holding that private damages actions against utilities for violations of law under 2106 are "limited to those situations in which an award of damages would not hinder or frustrate the Commission's declared supervisory and regulatory policies." (*Id.* at 4) This rationale applies in construing the permissible breadth of tariff limitations.

The "*Waters* Rule" was further explained in *Covalt*, *supra,* 13 Cal.4th at 918 which stated that a § 2106 action cannot be maintained "when an award of damages would simply have the effect of undermining a general supervisory or regulatory policy of the Commission, i.e., when it would 'hinder' or 'frustrate' or 'interfere with' or 'obstruct' that policy." Actions which do "not 'hinder' a policy of the Commission within the meaning of *Waters* . . . may proceed." (Id. at 818-819)

Pacific Bell's disregard of the CPUC's specific directives to it by improperly identifying the location of the pay phone and providing the wrong location address to the 911 system, and consciously failing to correct what it knew to be a dangerous situation, directly contravened both the orders and the policy of the Commission. This had nothing to do with public safety

or providing services to the public. Rather, it was solely for profit coin collection. The Allisons' catastrophic injuries resulted.

In declining to recognize this distinction, the Appellate Court interpreted Pac Bell's tariff limitation on liability in a manner which rendered it an unconstitutional delegation of the judicial power.

Respectfully submitted,

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APPENDIX

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS
IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

Court of Appeal - Second Dist.
FILED
Dec 18 1998
Joseph A. Lane, Clerk

Deputy Clerk

PACIFIC BELL,
Petitioner,
v.
The Superior Court of Los Angeles County,
Respondent.

JOHN ALLISON, et al.,
Real Parties in Interest.

B124873 (Super. Ct. No. PC010838)
(Jerold A. Krieger, Judge)

ORIGINAL PROCEEDING. Petition for writ of mandate denied.

Pacific Telesis Legal Group, Gleam O. Davis, Carpenter & Rothans, Martin L. Carpenter and Nancy P. Doumanian, for Petitioner.

No appearance for Respondent.

Mazursky, Schwartz & Angelo, Christopher E. Angelo and Anthony Kornarens, for Real Party in Interest.

Petitioner, Pacific Bell, a defendant in a personal injury action filed by John and Renee Allison (plaintiffs), seeks a writ of mandate directing respondent court to grant its motion for summary judgment based on a limitation of liability provision in one of its tariffs on file with the Public Utilities Commission (PUC). That tariff limits Pacific Bell's liability for damages "arising out of mistakes, omissions, interruptions, delays, errors or defects in any of the services or facilities furnished by the Utility" to a credit allowance not exceeding its charges to the customer for the applicable billing period. Plaintiffs' claim in this case is based upon Pacific Bell's placement of an incorrect address on a pay telephone from which plaintiffs dialed "9-1-1." Since plaintiffs were not charged for the 9-1-1 call, Pacific Bell contends plaintiffs are not entitled to collect any damages.

The applicable tariff does permit claims based upon gross negligence, but limits the recoverable damages to $10,000. We hold that although the tariff bars plaintiffs' claims to the extent they are based on ordinary negligence plaintiffs have presented sufficient facts to create a triable issue of facts as to whether Pacific Bell was grossly negligent. Because plaintiffs have a potential recovery of $10,000, Pacific Bell is not entitled to summary judgment.

FACTS AND PROCEDURAL HISTORY

On September 13, 1992, plaintiff John Allison either dove or fell into the shallow end of a swimming pool at his condominium complex, Rainbow Glen Estates. Mr. Allison struck his head on the concrete pool and was rendered a quadriplegic.

When Mr. Allison was injured, one of his companions called "9-1-1" from a Pacific Bell pay phone installed at the condominium's pool and recreation area. According to plaintiffs, when Pacific Bell installed the wiring for the pay phone two years prior to the accident, it backtracked the wire to determine its point of origin, which was one of the model homes at the complex. The address which Pacific Bell affixed to the pay phone and input into the 9-1-1 emergency data base was the address of the model home, 20815 Greenjay Place, and not the address of the pool and recreation area, 26815 Rainbow Glen Drive. Pacific Bell collected coins from the pay phone on several occasions, but never changed the address posted on the phone. Thus, emergency medical personnel could not locate Mr. Allison because, although they responded promptly to the 9-1-1 call, they went to the wrong address. Mrs. Allison, her daughter and others at the pool complex could hear the sirens and see the flashing lights on the paramedic ambulance as it went up and down other streets at the complex. Finally, someone from the group went and flagged down the ambulance. Mr. Allison did not received medical attention until 35 to 45 minutes after the accident; plaintiffs contend the delay exacerbated his injuries because during the period of delay, a jagged portion of Mr. Allison's cervical spine was allowed "to repeatedly traumatize his spinal cord."

Settlements and pretrial motions have reduced the number of defendants in this case to two, Pacific Bell and Warmington Homes, the condominium developer.

In November 1997, Pacific Bell filed a motion for summary judgment or, in the alternative, summary adjudication of issues. In January 1998, respondent

court granted the motion for summary adjudication as to plaintiffs' causes of action for product liability, public nuisance, breach of implied warranty, and strict liability in tort. Plaintiffs' claims against Pacific Bell for loss of consortium and negligence remained. The case was set for trial on August 24, 1998.

On July 28, 1998, Division One of this court issued its opinion in *Los Angeles Cellular Telephone Co. v. Superior Court* (1998) 65 Cal.App.4th 1013 (rev. den. 10/21/98) ("L.A. Cellular"). In that case, the plaintiff sued L.A. Cellular because she could not get a "9-1-1" connection from her cellular phone and was therefore unable to summon help as she was being pursued by two attackers, one of whom shot her in the face. L.A. Cellular's tariff on file with the Public Utilities Commission (PUC) contained a provision limiting L.A. Cellular's liability for negligence resulting from an "interruption in service" to $5,000. Division One issued a writ of mandate directing the superior court to grant L.A. Cellular's motion for summary adjudication of one of its affirmative defenses, thus limiting plaintiff's recovery to the $5,000 provided for in the tariff.

On or about August 3, 1998, Pacific Bell, relying on *L.A. Cellular*, filed a motion for reconsideration of the January 1998, order denying its motion for summary judgment. In opposition to the motion, plaintiffs distinguished *L.A. Cellular*, arguing that their claims were not based upon an "interruption in service" but upon independent acts of negligence not within the tariff's purview.

On August 20, 1998, respondent court granted the motion for reconsideration, but denied the motion for summary judgment, finding that "the PUC tariff is not an absolute defense." The court commented at the

hearing below, "Even if the telephone company, under the regulation or the tariff, were excused from its mistake in having the wrong number, does that excuse the subsequent negligence of workers for Pacific Bell in not correcting the mistake? Because that seems to me to be a separate act of negligence that is not included within the tariff."

Pacific Bell filed this petition on August 24, 1998, the trial date. We issued an alternative writ of mandate and stayed the trial as to Pacific Bell only. Respondent court did not comply with the alternative writ.

DISCUSSION

As a public utility, Pacific Bell is regulated by the PUC. The PUC has the power to "supervise and regulate every public utility in the State" (Pub. Util. Code, § 701) and "is specifically empowered to require utilities to file tariff schedules containing rates, charges and classifications, 'together with all rules, contracts, privileges, and facilities which in any manner affect or relate to rates, tolls, rentals, classifications, or service.' ([Pub. Util. Code,] § 489.)" (*Waters v. Pacific Telephone Co.* (1974) 12 Cal.3d 1, 6.) These schedules, or "tariffs," have the force and effect of a statute. (*Dyke Water Co. v. Public Utilities Com.* (1961) 56 Cal.2d 105, 123.) A tariff, including a limitation of liability provision, is binding on the utility's customers, whether or not they are aware of the tariff's provisions. (*Trammel v. Western Union Tel. Co.* (1976) 57 Cal.App.3d 538, 551-552.) "The subject of limitations upon liability of telephone utilities has long been considered to be a proper subject for [PUC] regulation and supervision, . . ." (*Waters, supra*, 12

Cal.3d at p. 6.) "'The theory underlying these decisions is that a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges, shall likewise be regulated and limited as to its liabilities . . . . Reasonable rates are in part dependent upon such a rule.'" (*Id.* At p. 7, citing *Cole v. Pacific Tel. & Tel. Co.* (1950) 12 Cal.App.2d 416, 419.)

Pacific Bell filed its A2 tariff on May 10, 1983. Rule 14 of the A2 tariff provides in pertinent part:

> "2.1.14 RULE NO. 14 - LIMITATION OF LIABILITY
>
> "A. LIMITATIONS
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> "1. The provisions of this rule do not apply to errors and omissions caused by willful misconduct, fraudulent conduct, or violations of law.
>
> "2. In the event an error or omission is caused by the gross negligence of the Utility, the liability of the Utility shall be limited to and in no event exceed the sum of $10,000.
>
> "3. The utility will not provide a credit allowance for interruptions of service caused by the customer's facilities, equipment, or systems.
>
> "4. Except as provided in A3 of this rule, the liability of the Utility for damages arising out of *mistakes, omissions, interruptions, delays, errors or defects in any of the services or facilities furnished by the Utility up to and including its local loop demarcation point, including exchange, toll, private line, supplemental equipment, alphabetical directory listings (excluding the use of bold face type) and all other services*, shall in no event exceed an amount equal to the pro rata charges to the

> customer for the period during which the services or facilities are affected by the mistake, omission, interruption, delay, error or defect, . . . [I]n no event shall the liability exceed the total amount of the charges to the customer for all services or facilities for the period affected by the mistake, omissions, interruption, delay, error or defect." (Emphasis added.)[1]

The A2 tariff limits plaintiffs' claims to the extent they are based on ordinary negligence.

Plaintiffs contend that the A2 tariff limits negligence claims only if they are based upon an interruption in telephone service; it does not limit other claims based upon ordinary negligence. To support their argument, plaintiffs cite a number of cases in which injured parties were entitled to pursue negligence claims against Pacific Bell or its predecessor, Pacific Telephone. (See, e.g., *Bigbee v. Pacific Tel. & Tel. Co.* (1983) 34 Cal.3d 49 [third party driver struck negligently placed telephone booth]; *Roulston v. Pacific Tel. & Tel. Co.* (1979) 96 Cal.App.3d 149 [plaintiff injured by negligently driven Pacific Telephone truck]; *Elder v. Pacific Tel. & Tel. Co.* (1977) 66 Cal.App.3d 650 [workman injured at Pacific Telephone construction site].)

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[1]The limitation of liability provision also covers 9-1-1 calls. Section 3 B3 of the PUC's A9 tariff, dealing with 9-1-1 service, provides: "The Utility's liability to 9-1-1 customers and third parties utilizing the 9-1-1 service is set forth in Schedule Cal. P.U.C. No. A2.1.14." For purposes of 9-1-1 service, the "customer" is the political subdivision or municipal corporation which places an order for 9-1-1 emergency service. (Schedule Cal. P.U.C. No. A9, 3rd Revised Sheet 224, filed March 7, 1990.)

Both parties have focused their arguments on whether their was an "interruption in services," as in *L.A. Cellular*. However, the appropriate inquiry is whether plaintiffs' negligence claims are based upon the rendition of "any of the services or facilities furnished" by Pacific Bell. The negligence cases cited by plaintiffs do not involve the provision of telephone services. Other cases, however, have upheld the tariff's limitation of liability provisions where, for example, the Pacific Bell's predecessor failed to provide *adequate* telephone service (*Waters, supra*) or omitted plaintiff's ad from the "Yellow Pages" (*Davidian v. pacific Tel. & Tel. Co.* (1971) 16 Cal.App.3d 750). Since the placing of an address on a pay telephone is one of the "services or facilities furnished" by Pacific Bell, plaintiffs' damages are limited by the "credit allowance" provisions of the A2 tariff. In plaintiffs' case, the damages are zero because 9-1-1 service is provided at no cost to the caller.

There are triable issues of fact on the issue of gross negligence.

A claim based upon *gross* negligence is a specific exception to the A2 tariff. (*Colich & Sons v. Pacific Bell* (1988) 198 Cal.App.3d 1225, 1240). The distinction between ordinary and gross negligence "amounts to a rule of policy that a failure to exercise due care in those situations where the risk of harm is great will give rise to legal consequences harsher than those arising from negligence in less hazardous situations." (*Ibid*, citing *Donnelly v. Southern Pac. Co.* (1941) 18 Cal.2d 863, 871.)

In this case, Pacific Bell placed an incorrect address on a pay telephone in a swimming pool and recreation area, a place where the odds of an accident

occurring are greater than normal. That being the case, the accuracy of the address information on the telephone is particularly significant. Plaintiffs presented evidence in opposition to Pacific Bell's motion that Pacific Bell knew the address on the telephone was inaccurate and failed to correct the mistake, despite the fact that its technicians visited the site on a number of occasions to collect coins from the phone. Pacific Bell has also admitted that when the address on a particular telephone does not match the phone's location, the coin collector is supposed to notify Pacific Bell's business office. That was not done in this case. Pacific Bell also knew that the telephone would be linked to the 9-1-1 system, making it imperative that the telephone reflect the premises' correct address.

"Whether there has been such a lack of care as to constitute gross negligence is generally a triable question of act." (*Colich & Sons v. Pacific Bell, supra,* 198 Cal.App.3d at p. 1241.) The evidence presented by plaintiffs in opposition to the summary judgment motion was sufficient to create a triable issue of fact as to whether Pacific Bell was grossly negligent when it failed to insure the accuracy of the address on the pool area pay phone.[2]

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[2]On the facts presented, Pacific Bell's failure to correct the address does not, as plaintiffs contend, rise to the level of willful misconduct. Nor are we persuaded by plaintiffs' contention that the $10,000 damage limitation in the tariff is an unconstitutional limitation on their right to due process. (See *Waters, supra,* 12 Cal.3d at pp. 6-7.)

CONCLUSION

Rule 14 of the A2 tariff limits damage claims arising out of "mistakes, omissions, interruptions, delays, errors or defects in any of the services or facilities furnished by" Pacific Bell to the cost of the service provided. By its terms, the tariff applies to the posting of the premises address on a pay telephone, one of the "services or facilities furnished by" Pacific Bell. If Pacific Bell's failure to insure that the pay telephone bore the correct address is ordinary negligence, plaintiffs' damages are limited to zero, the cost of the service provided.

However, if Pacific Bell's conduct amounts to gross negligence, plaintiffs may recover up to $10,000, the "cap" amount set forth in the tariff. Because there are triable issues of fact as to whether Pacific Bell was grossly negligent, it is not entitled to summary judgment.

DISPOSITION

The petition for writ of mandate is denied. Plaintiffs are to recover their costs of this proceeding.

ARMSTRONG, J.

We concur:

TURNER, P.J. GODOY PEREZ, J.

Second Appellate District, Division Five, No. B124873
S076188

IN THE SUPREME COURT OF CALIFORNIA

Supreme Court
FILED
March 9, 1999
Robert Wandruff, Clerk

_____
Deputy

PACIFIC BELL,
Petitioner
v.
Los Angeles County Superior Court,
Respondent.

JOHN ALLISON et al.,
Real Parties in Interest

Real Parties In Interest's petition for review DENIED.
Mosk, J., is of the opinion the petition should be granted.
Werdegar, J., did not participate.

George
Chief Justice

Public Utilities Code § 1759. Jurisdiction

No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation therefore, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, except that the writ of mandamus shall lie from the Supreme Court to the commission in all proper cases.

Public Utilities Code § 2106. Liability for damage or injury caused by violation; exemplary damages; effect of recovery on rights of state

Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was wilful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

No recovery as provided in this section shall in any manner affect a recovery by the State of the penalties provided in this part or the exercise by the commission of its power to punish for contempt.

Cal. Const. Art. XII, § 1. Commission; membership vacancies; removal

Section 1. The Public Utilities Commission consists of 5 members appointed by the Governor and approved by the Senate, a majority of the membership concurring, for staggered 6-year terms. A vacancy is filled for the remainder of the term. The Legislature may remove a member for incompetence, neglect of duty, or corruption, two thirds of the membership of each house concurring.

Cal. Const. Art. XII, § 2. Establishment of procedures; hearings, investigations, issuance of orders

Sec. 2. Subject to statute and due process, the commission may establish its own procedures. Any commissioner as designated by the commission may hold a hearing or investigation or issue an order subject to commission approval.

Cal. Const. Art. XII, § 3. Classification; control by legislature; additional classes

Sec. 3. Private corporations and persons that own, operate, control, or manage a line, plant, or system for the transportation of people or property, the transmission of telephone and telegraph messages, or the production, generation, transmission, or furnishing of heat, light, water, power, storage, or wharfage directly or indirectly to or for the public, and common carriers, are public utilities subject to control by the Legislature. The Legislature may prescribe that additional classes of private corporations or other persons are public utilities.

Cal. Const. Art. XII, § 4. Transportation of passengers and property; rates; rules; increases

Sec. 4. The commission may fix rates and establish rules for the transportation of passengers and property by transportation companies, prohibit discrimination, and award reparation for the exaction of unreasonable, excessive, or discriminatory charges. A transportation company may not raise a rate or incidental charge except after a showing to and a decision by the commission that the increase is justified, and this decision shall not be subject to judicial review except as to whether confiscation of property will result.

Cal. Const. Art. XII, § 5. Additional authority and jurisdiction of commission; review; eminent domain

Sec. 5. The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record and to enable it to fix just compensation for utility property taken by eminent domain.

Cal. Const. Art. XII, § 6. Duties of commission

Sec. 6. The commission may fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.

Cal. Const. Art. XII, § 7. Transportation company; passes and discounts; forfeiture of office; conflicts of interest

Sec. 7. A transportation company may not grant free passes or discounts to anyone holding an office in this state; and the acceptance of a pass or discount by a public officer, other than a Public Utilities Commissioner, shall work a forfeiture of that office. A Public Utilities Commissioner may not hold an official relation to nor have a financial interest in a person or corporation subject to regulation by the commission.

Cal. Const. Art. XII, § 8. Local regulation; exceptions

Sec. 8. A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission. This section does not affect power over public utilities relating to the making and enforcement of police, sanitary, and other regulations concerning municipal affairs pursuant to a city charter existing on October 10, 1911, unless that power has been revoked by the city's electors, or the right of any city to grant franchises for public utilities or other businesses on terms, conditions, and in the manner prescribed by law.

Cal. Const. Art. XII, § 9. Restatement of existing law

Sec. 9. The provisions of this article restate all related provisions of the Constitution in effect immediately prior to the effective date of this amendment and make no substantive change.

June 4, 1999